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A BRIEF SURVEY OF EQUITY JURISDICTION.[1]

II.

IT is because rights exist and because they are sometimes violated that remedies are necessary. The object of all remedies is the protection of rights. Rights are protected by means of actions or suits. The term "remedy" is applied either to the action or suit by means of which a right is protected, or to the protection which the action or suit affords. An action may protect a right in three ways, namely, by preventing the violation of it, by compelling a specific reparation of it when it has been violated, and by compelling a compensation in money for a violation of it. The term "remedy" is strictly applicable only to the second and third of these modes of protecting rights; for remedy literally means a cure,—not a prevention. As commonly used in law, however, it means prevention as well as cure; and it will be so used in this paper. In equity the term "relief" is commonly used instead of "remedy;" and, though relief is a much more technical term than remedy, it has the advantage of being equally applicable to all the different modes of protecting rights.

Though remedies, like rights, are either legal or equitable, yet the division of remedies into legal and equitable is not co-ordinate with the corresponding division of rights; for, though the reme-

[1] Continued from page 72.

dies afforded for the protection of equitable rights are all equitable, the remedies afforded for the protection of legal rights may be either legal or equitable, or both.

Actions are either *in personam* or *in rem*. Actions *in personam* are founded upon torts, actual or threatened, or upon breaches of personal obligations, actual or threatened. They are called *in personam* because they give relief only against the defendant personally, *i. e.*, the plaintiff has no claim to or against any *res*. Actions *in rem* are founded upon breaches of real obligations, or upon the ownership of corporeal things, movable or immovable. Actions founded upon breaches of real obligations are called *in rem*, because they give relief only against a *res*. Actions founded upon the ownership of corporeal things are called *in rem*, because the only relief given in such actions is the possession of the things themselves. Actions *in rem*, as well as actions *in personam*, are (except in admiralty) in form against a person. The person, however, against whom an action *in personam* is brought, is fixed and determined by law; namely, the person who incurred (and consequently the person who broke or threatened to break) the obligation, or the person who committed or threatened to commit the tort, while the person against whom an action *in rem* is brought is any person who happens to be in possession of the *res*, and who resists the plaintiff's claim. The relief given in actions *in personam* may be either the prevention or the specific reparation of the tort or of the breach of obligation, or a compensation in money for the tort or for the breach of obligation. The relief given in an action *in rem*, founded on the breach of a real obligation, is properly the sale of the *res*, and the discharge of the obligation out of the proceeds of the sale. The relief given in an action *in rem*, founded on the ownership of a corporeal *res*, is the recovery of the possession of the *res* itself by the plaintiff.

Actions *in rem* founded upon ownership are anomalous. As every violation of a right is either a tort or a breach of obligation, it would naturally be supposed that every action would be founded upon a tort or breach of obligation, actual or threatened; and if this were so, the only actions *in rem* would be those founded upon breaches of real obligations. But when a right consists in the ownership of a corporeal thing, a violation of that right may consist in depriving the owner of the possession (and consequently of the use and enjoyment) of the thing. If such a tort had the

effect of destroying the owner's right, as the physical destruction of the thing would, it would not differ from other torts in respect to its remedy; for the tort-feasor would then become the owner of the thing, and its former owner would recover its value in money as a compensation for the tort. And by our law, in case of movable things, the tort often has the effect practically of destroying the owner's right, sometimes at his own election, sometimes at the election of the tort-feasor. But, subject to that exception, the tort leaves the right of the owner untouched, the thing still belonging to him. He can, indeed, bring an action for the tort, and recover a compensation in money for the injury that he has suffered down to the time of bringing the action ;[1] but the compensation will not include the value of the thing, as the thing has not, in legal contemplation, been lost. If, therefore, an action for the tort were the owner's only remedy, he must be permitted to bring successive actions *ad infinitum*, or as long as the thing continued to exist; for in that way alone could he obtain full compensation for the injury which he would eventually suffer. But, as the law abhors a multiplicity of actions, it always enables the owner to obtain complete justice by a single action, or at most by two actions. Thus, it either enables him to recover the value of the thing in an action for the tort, by making the tort-feasor a purchaser of the thing at such a price as a jury shall assess, or it enables him to recover the possession of the thing itself in an action *in rem*. He is, however, further entitled to recover the value of the use and enjoyment of the thing during the time that the defendant has deprived him of its possession, together with compensation for any injury which the thing itself may have suffered while in the defendant's possession ; and this he recovers, sometimes in the same action in which he recovers the thing itself or its value, and sometimes in a separate action.

[1] The reader should be reminded, however, that by our law an owner of immovable property who has been dispossessed (*i.e.*, disseised) of it, can recover damages in an action of tort only for the original dispossession; he cannot recover damages for the subsequent detention of the property until he has recovered its possession. The reason is, that a loss of the possession or seisin of immovable property is technically a loss of the ownership, and the acquisition of possession or seisin is an acquisition of ownership, though it may be wrongful. Hence, a disseisor ceases to be a trespasser the moment his disseisin is completed. When, however, the original owner recovers back his lost seisin, his recovered seisin relates back to the time of the disseisin, the law treating him as having been in possession all the time. Hence, he can then recover damages for the wrongful detention of the property.

It seems, therefore, that an action *in rem*, founded upon ownership, may be regarded as a substitute for an infinite or an indefinite number of actions founded upon the tort of depriving the plaintiff of the possession of the *res*, which is the subject of the action; and that such an action may, therefore, be regarded as in a large sense founded upon the tort just referred to, and the recovery of the thing itself as a specific reparation of that tort.

Thus far, in speaking of actions and remedies, it has been assumed that the law of any given country is a unit; *i. e.*, that there is but one system of law in force by which rights are created and governed, and also but one system of administering justice. Whenever, therefore, any given country has several systems, whether of substantive or remedial law, what has been thus far said is intended to apply to them all in the aggregate,—not to each separately. Thus, in English-speaking countries there are no less than three systems of substantive law in force, each of which has a remedial system of its own; namely, the common law, the canon law, and admiralty law. There is also a fourth system of remedial law, namely, equity. What has been said, therefore, of actions and remedies applies to all of these systems in the aggregate.

It follows, therefore, that in English-speaking countries civil jurisdiction is parcelled out among the four systems just referred to; and it is the chief object of this paper to ascertain what portion of this jurisdiction belongs to equity, and for what reasons.

But here an important question arises as to the nature of equity jurisdiction. If we have three systems of substantive law, each exercising jurisdiction over those rights which are of its own creation, and if equity is a system of remedial law only, how does it happen that equity has any jurisdiction? Do not the other three systems divide among themselves the entire field of jurisdiction, and how then is there any room for equity? The answer is that the term "jurisdiction," as applied to equity, has a very different meaning from what it has as applied to courts of law; and the failure to recognize that fact has caused much confusion of ideas. As applied to courts of law, the term is used in its primary and proper sense; as applied to equity, it is used in a secondary and improper sense. For example, when two courts of law, created by the same sovereign, are independent of each other, the jurisdiction of each is either exclusive of the other, or concurrent with it, or it

is partly exclusive and partly concurrent. If one invades a province which belongs exclusively to the other, it acts without right (if not without power), and ought to be restrained by the common sovereign. If a particular province belongs to them both (*i.e.*, if they have concurrent jurisdiction over it), each is entitled to enter it, while neither is entitled to interfere with the other; and hence questions of priority are liable to arise between them, *i. e.*, questions as to which of them first obtained jurisdiction over given controversies. But the terms "concurrent" and "exclusive" have no proper application to equity, or rather they do not correctly describe the relations between equity and the other three systems. On the one hand, equity never excludes either of the other systems. It is true that equity alone exercises jurisdiction over equitable rights; but that is not because equity claims any monopoly of such jurisdiction,—it is because the other systems decline to exercise it, they not recognizing equitable rights. On the other hand, equity is never excluded by either of the other systems; and hence equity exercises jurisdiction over legal rights (as well as over equitable rights) without any external restraint. Since, however, one or more of the other systems has jurisdiction over every legal right, the jurisdiction of equity over legal rights is in a certain sense concurrent, but never in any proper sense; and not unfrequently it is in fact exclusive in the sense of being the only jurisdiction that is actually exercised. It is not properly concurrent, because there is no competition between the two jurisdictions. Courts of law act just as they would act if equity had no existence, just as in fact they did act before equity had any existence. Nor does equity ever complain of their so acting, or seek to put any restraint upon their action, or question the validity and legality of their acts; and yet equity acts with the same freedom from restraint, even when dealing with legal rights, that courts of law do when dealing with rights of their own creation.

What has thus far been said, however, is calculated rather to stimulate than to satisfy inquiry. How is it that equity has the power to invade at will the provinces of other courts? What object has equity in assuming jurisdiction over rights which it is the special province of other courts to protect? What is the extent of that jurisdiction? The answer to the first of these questions will be found in the fact that the jurisdiction of equity is a prerogative jurisdiction; *i. e.*, it is exercised in legal contemplation by

the sovereign, who is the fountain from which all justice flows, and from whom, therefore, all courts derive their jurisdiction. The answer to the second question is that the object of equity, in assuming jurisdiction over legal rights, is to promote justice by supplying defects in the remedies which the courts of law afford. The answer to the third question is that the jurisdiction is coextensive with its object; that is, equity assumes jurisdiction over legal rights so far, and so far only, as justice can be thereby promoted. But then the question arises, How does it happen that the protection afforded by courts of law to legal rights is insufficient and inadequate, and how is it that equity is able to supply their short-comings? The answer to these questions, so far as regards the largest and most important part of the jurisdiction exercised by equity over legal rights (namely, that exercised over common law rights), will be found chiefly in the different methods of protecting rights employed by courts of common law and courts of equity respectively, *i. e.*, in the different methods of compulsion or coercion employed by them.

A court of common law never lays a command upon a litigant, nor seeks to secure obedience from him. It issues its commands to the sheriff (its executive officer); and it is through the physical power of the latter, coupled with the legal operation of his acts and the acts of the court, that rights are protected by the common law. Thus, when a common-law court renders a judgment in an action that the plaintiff recover of the defendant a certain sum of money as a compensation for a tort or for a breach of obligation, it follows up the judgment by issuing a writ to the sheriff, under which the latter seizes the defendant's property, and either delivers it to the plaintiff at an appraised value in satisfaction of the judgment, or sells it, and pays the judgment out of the proceeds of the sale. Here, it will be seen, satisfaction of the judgment is obtained partly through the physical acts of the sheriff, and partly through the operation of law. By the former, the property is seized and delivered to the plaintiff, or seized and sold, and the proceeds paid to the plaintiff. By the latter, the defendant's title to the property seized is transferred to the plaintiff, or his title to the property is transferred to the purchaser, and his title to its proceeds to the plaintiff. So if a judgment be rendered that the plaintiff recover certain property in the defendant's possession, on the ground that the property belongs to the plaintiff,

and that the defendant wrongfully detains it from him, the judgment is followed up by a writ issued to the sheriff under which the latter dispossesses the defendant, and puts the plaintiff in possession. This is an instance, therefore, in which a judgment is enforced through the physical power of the sheriff alone. If, however, the property be movable, and the defendant remove or conceal it so that the sheriff cannot find it, the court is powerless. So, under a judgment for the recovery of money, the court is powerless, if the defendant (not being subject to arrest) have no property which is capable of seizure, or none which the sheriff can find; and it matters not how much property incapable of seizure he may have. Even when the defendant is subject to arrest, his arrest and imprisonment are not regarded by the law as a means of compelling him to pay the judgment; but his body is taken (as his property is) in satisfaction of the judgment.

Nor is our common law peculiar in its method of protecting rights; for the same method substantially is and always has been employed in most other systems of law with which we are acquainted. *Nemo potest præcise cogi ad factum* was a maxim of the Roman law, and it has been adhered to in those countries whose systems of law are founded upon the Roman law.

Equity, however, has always employed, almost exclusively, the very method of compulsion and coercion which the common law, like most other legal systems, has wholly rejected; for when a person is complained of to a court of equity, the court first ascertains and decides what, if anything, the person complained of ought to do or refrain from doing; then, by its order or decree, it commands him to do or refrain from doing what it has decided he ought to do or refrain from doing; and finally, if he refuses or neglects to obey the order or decree, it punishes him by imprisonment for his disobedience. Even when common law and equity give the same relief, each adopts its own method of giving it. Thus, if a court of equity decides that the defendant in a suit ought to pay money or deliver property to the plaintiff, it does not render a judgment that the plaintiff recover the money or the property, and then issue a writ to its executive officer commanding him to enforce the judgment; but it commands the defendant personally to pay the money or to deliver possession of the property, and punishes him by imprisonment if he refuse or neglect to do it.

This method was borrowed by the early English chancellors from the canon law, and their reasons for borrowing it were much the same as those which caused its original adoption by the canonists. The canon-law courts had power only over the souls of litigants; they could not touch their bodies nor their property. In short, their power was spiritual, not physical, and hence the only way in which they could enforce their sentences was by putting them into the shape of commands to the persons against whom they were pronounced, and inflicting upon the latter the punishments of the church (ending with excommunication) in case of disobedience. If these punishments proved insufficient to secure obedience, the civil power (in England) came to the aid of the spiritual power, a writ issued out of chancery (*de excommunicato capiendo*), and the defendant was arrested and imprisoned.

When the English chancellor began to assume jurisdiction in equity he found himself in a situation very similar to that of the spiritual courts. As their power was entirely spiritual, so his was entirely physical. Through his physical power he could imprison men's bodies and control the possession of their property; but neither his orders and decrees, nor any acts *as such* done in pursuance of them, had any legal effect or operation; and hence he could not affect the title to property, except through the acts of its owners. Moreover, his physical power over property had no perceptible influence upon his method of giving relief. Even when he made a decree for changing the possession of property, it took the shape, as we have seen, of a command to the defendant in possession to deliver possession to the plaintiff; and it was only as a last resort that the chancellor issued a writ to his executive officer, commanding him to dispossess the defendant and put the plaintiff in possession.

Such, then, being the two methods of giving relief, it is easy to understand why that of equity has supplemented that of the common law; for the former is strong at the very points where the latter is weak.

It has been said that the extent of the jurisdiction exercised by equity over common-law rights is measured by the requirements of justice. But what are the requirements of justice? In order to answer that question we must first know definitely in what particulars the common law fails to give to common-law rights all the protection which it is possible to give, and which, therefore, ought

to be given; and we shall have taken an important step in that direction if we classify all the remedies furnished by the common law, and compare them with the classification before made of judicial remedies generally.

Common-law actions, like actions generally, are either *in personam* or *in rem.* Common-law actions *in personam* are founded upon the actual commission of a common-law tort or the actual breach of a common-law personal obligation. Common-law actions *in rem* are founded upon the ownership of corporeal things, movable or immovable. The relief given in a common-law action *in personam* is always the same; namely, a compensation in money for the tort or the breach of obligation, the amount of which is ascertained or assessed by a jury under the name of damages.[1] The relief given in common-law actions *in rem* is also always the same, namely, the recovery of the *res*; but, then, it is to be borne in mind that the only action strictly *in rem* that lies for a movable *res* is the very peculiar action of replevin; and, when that action cannot be brought, the only available actions are trover, in which the value of the *res* in money can alone be recovered, and detinue, in which either the *res* itself or its value in money is recovered, at the option of the defendant. Indeed, as has been already seen, the common law has not generally the means of enabling a plaintiff to recover the possession of a movable *res* against the will of the defendant. In replevin that object is accomplished by dispossessing the defendant of the *res*, and placing the same in the plaintiff's possession, at the very commencement of the action; but that would be obviously improper except when the defendant has acquired the possession of the *res* by dispossessing the plaintiff of it. The obstacle in the way of recovering possession of the *res* itself in an action of detinue does not arise from the nature of the action, but from the common-law mode of

[1] Our law regards a debt as a specific thing belonging to the creditor and in possession of the debtor; and hence the remedy specially provided for the breach of an obligation to pay a debt, namely, the action of debt, is technically an action *in rem.* Sometimes this is the only remedy; but in most cases the creditor has an election between an action of debt, founded upon the debt itself, and an action of assumpsit or covenant, founded upon the contract by which the debt was created. In the former action, the judgment is that the plaintiff recover the debt itself as a specific thing; in the two latter, the judgment is that the plaintiff recover damages for the detention of the debt. Still, this is only a technical distinction, for the same amount is recovered either way, and the mode of enforcing the judgment is the same.

enforcing a judgment. Detinue is in its nature an action purely *in rem;* and it only ceased to be so in practice because a judgment *in rem* was found to be wholly ineffective; and consequently a judgment was rendered in the alternative, namely, for the recovery of the *res* itself or its value in money.

If, now, we compare the foregoing common-law remedies with the scheme of remedies generally, as previously given, we find that the common law does not attempt (as indeed it could not) to prevent either the commission of a tort or the breach of an obligation; nor does it attempt to give a specific reparation for either, except so far as the recovery of the *res* in an action *in rem* may be so considered; nor does it give any action whatever for the breach of a real obligation; nor does it enable the owner of movable things to recover the possession of them when wrongfully detained from him, except in those cases in which replevin will lie. Of these four defects in common-law remedies, the first two are the most conspicuous; and it is chiefly for the purpose of supplying those two defects that equity has assumed jurisdiction over torts (*i.e.*, legal torts) and over contracts, — the two largest and most important branches of the jurisdiction exercised by equity over legal rights. The jurisdiction over torts has been assumed chiefly for the purpose of supplying a remedy by way of prevention; that over contracts for the purpose of supplying a remedy by way of specific reparation. The former is commonly treated of under the head of Injunction; the latter, under the head of Specific Performance.

The mode of giving relief in equity is not only peculiarly adapted to the purpose of preventing the commission of wrongful acts, but it is the only mode in which such a remedy is possible. No mode of giving relief is, however, alone sufficient to make such a remedy effective; for relief cannot be given until the end of a suit, *i.e.*, until the question of the plaintiff's right to relief has been tried and decided in the plaintiff's favor; and, long before that time can arrive, the wrongful act may be committed, and so prevention made impossible. If, therefore, a court would prevent the doing of an act, it is indispensable that it interpose its authority, not only before any trial of the question of the defendant's right to do the act, but at the very commencement of the suit, and frequently without any previous notice to the defendant; and accordingly equity does so interpose its authority by granting an

injunction against the doing of the act until the question is tried and decided. Such an injunction is called a temporary injunction, and is not technically relief. If the question is finally decided in the plaintiff's favor, the injunction is then made perpetual, and becomes relief.

Upon the whole, therefore, the equitable remedy by way of prevention is as effective as such a remedy can possibly be made; and it is also as effective and as easily administered as any remedy in equity is. Moreover, the remedy by way of prevention, if it does not come too late, is always the easiest, as well as the best, remedy that equity can give in case of a tort; and, therefore, it is never an answer to a bill for an injunction to prevent the commission of a tort, that the tort, if committed, can be specifically repaired by the defendant; and the only question of jurisdiction that such a bill can ever raise is this: Will more perfect justice be done by preventing the tort than by leaving the plaintiff to his remedy at law? This, however, is a very complex question, depending partly upon the nature of the tort, and partly upon other considerations. In respect to the nature of the tort, also, there are several distinctions to be taken. For example, some torts cause no specific injury; others cause injury which, though it is specific, can be specifically repaired by the person injured; others cause injury which, though specific and incapable of specific reparation, can be fully paid for in money. On the other hand, a tort may cause an injury which is specific, and which cannot be specifically repaired (or can be specifically repaired only by the tort-feasor), and which cannot be fully paid for in money. So, too, the injury caused by a tort, though not specific, or though capable of being specifically repaired by the person injured, or though capable of being fully paid for in money, yet is of such a nature that it is impossible to ascertain or estimate its extent with any accuracy. Whenever, therefore, a tort will cause an injury which is specific, and which the person injured cannot specifically repair, and which cannot be paid for in money, *or* an injury the extent of which it is impossible to ascertain or estimate with any accuracy, there is a *prima facie* case for the interference of equity to prevent the commission of the tort; otherwise the remedy at law is adequate so far as regards the nature of the tort. If a plaintiff make out a *prima facie* case in one of the two ways just indicated, he will be entitled to the interference of equity unless the defendant can show

that the damage which will be caused to him by the prevention of the act will so much exceed the damage which will be caused to the plaintiff by the doing of the act that the interference of equity will not be promotive of justice. If the defendant can show *that*, the plaintiff should, it seems, be left to his remedy at law. One objection to the interference of equity under such circumstances is that it is not likely to have any other effect than that of compelling the defendant to purchase the plaintiff's acquiescence at an exorbitant price.

It must be confessed, however, that the foregoing distinctions, though, it is conceived, they will throw much light upon the jurisdiction actually exercised, will not fully account for it, either affirmatively or negatively, even when it depends wholly upon the nature of the tort. Questions of jurisdiction do not receive the same careful and constant attention which is bestowed upon questions of substantive right; and therefore, in dealing with such questions, the elements of haste, accident, caprice, the habits of lawyers, the leanings of individual judges, and the ever-changing temper of public opinion, have been factors of no inconsiderable importance. The jurisdiction of equity over torts in particular has grown up by slow, almost imperceptible degrees; and the jurisdiction exercised over one class of torts has often had little influence upon the exercise of jurisdiction over other and analogous classes of torts.

It becomes necessary, therefore, to inquire briefly into the jurisdiction actually exercised by equity over different classes of torts. There are two large and important classes of torts over which equity practically assumes no jurisdiction whatever, namely, torts to the person and to movable property. Its jurisdiction, therefore, is substantially limited to torts, to immovable property, and to incorporeal property. Torts to immovable property are waste, trespass, and nuisance. Torts to incorporeal property may, it seems, all be classed as nuisances, though it is usual to treat torts to certain lawful monopolies, not relating to land (*e. g.*, patent-rights and copy-rights), as constituting a class by themselves under the name of infringements of the rights violated.

Waste is a tort committed by the owner of a particular estate in land, the person injured being the remainder-man or reversioner. It is, therefore, a tort to the land, committed by a person in possession of the land, and whose possession is rightful, against a

person who has neither the possession nor the right of possession. Hence, it is not a trespass, the essence of which is always a wrongful entry, and which is always an injury to the possession. It always consists in injuring or destroying something upon the land which belongs to the owner of the fee.

A nuisance to land is any injury to it which is committed without making an entry upon the land, and which, for that reason, is not a trespass. Any injury to incorporeal property is a nuisance, as a trespass can be committed only against corporeal things. Therefore, an act which would be a trespass to a corporeal thing will be only a nuisance to an incorporeal thing. For example, an obstruction by A of a right of way which B has over the land of C, is a trespass to C, but only a nuisance to B.

Over all the foregoing torts, namely, waste, trespass to land, and nuisance either to land or to incorporeal property (including infringements of such lawful monopolies as patents and copyrights), equity exercises a jurisdiction of greater or less extent; and it may be stated as a general rule, that, whenever the injury caused by a tort belonging to either of these classes will be of a serious and permanent character, equity will interfere to prevent it; but that for injuries which are only technical, or slight, or temporary, or occasional, the person injured will be left to his remedy at law. Thus, the injury caused by waste is necessarily permanent, being an injury to the inheritance; and in the great majority of cases the injury is of a substantial character. Accordingly, equity interferes to prevent waste almost as of course. If, however, the acts complained of, though technically waste, do not in fact injure the land,—still more, if they actually improve it,—the remainderman or reversioner will be left to his remedy at law.

Acts which will constitute waste when committed by the owner of a particular estate, will, of course, be (not waste, but) trespass when committed by a stranger; but such acts clearly ought to be prevented equally in either case. Accordingly, the rule now is, that equity will interfere to prevent destructive trespass to land, or trespass in the nature of waste; but it will not interfere to prevent trespasses which injure only the present possession; and, indeed, the first instance in which equity interfered to prevent destructive trespass was in the time of Lord Thurlow.[1]

[1] Flamang's case, cited in Mitchell *v.* Dors, 6 Ves. 147, in Hanson *v.* Gardiner, 7 Ves. 305, 308, in Smith *v.* Collyer, 8 Ves. 89, and in Thomas *v.* Oakley, 18 Ves. 184, 186.

In cases of waste there is seldom any controversy about the title to the land. Acts in the nature of waste, however, frequently raise questions of title; for such acts may be committed by a person who claims to own the land, but whose title is denied by another person who also claims to own the land; and in such a case either of the adverse claimants may be in possession. If the acts be committed by the one out of possession, he can always successfully defend an action of trespass by showing that the land is his. If the acts be committed by the one who is in possession, the one out of possession has no remedy at law, except an action of ejectment to recover the land itself. If he succeed in ejectment, and recover possession of the land, the other's acts will then (but not till then) become trespasses by relation, and damages may be recovered for them. How, then, will equity deal with such a case, if applied to by either of the claimants to prevent acts of the other in the nature of waste? The chief difficulty arises from the fact that the trial of the title does not belong to equity. Each claimant has a right to have the title tried at law and by a jury. Equity will not, therefore, interfere with the trial of the title. What will it do? If the plaintiff in equity is in possession there is no serious difficulty. Equity will entertain a bill, as in other cases, and will grant a temporary injunction; but the injunction will not be made perpetual until the plaintiff has recovered in an action of trespass; and if the plaintiff fail to bring such an action promptly, or to prosecute it with diligence, the injunction will be dissolved on the defendant's application. So, if the action be defended successfully, the bill in equity will be dismissed. If a temporary injunction be obtained before any trespass has been committed, of course the plaintiff in equity cannot maintain trespass upon the actual facts; but equity will get over that difficulty by directing the plaintiff to bring his action, and to declare in the usual form, and by directing the defendant not to traverse the declaration, but to plead only his affirmative defence of title.

When the plaintiff in equity is out of possession the difficulty is much greater. The acts of the defendant are not then trespasses, or torts of any kind, until made so by fictitious relation. How, then, can equity grant an injunction against acts which confessedly, upon the facts before the court, are not wrongful? Our law may be open to criticism for making no provision (except such as is made by the statutes against forcible entry and detainer) for

trying questions of possession in a summary way; but equity is not a lawgiver. Moreover, if equity is to interfere in such a case, it must, it seems, either strictly limit its interference to the granting of an injunction during the pendency of an ejectment, or it must take the entire litigation into its own hands, assuming control of the action of ejectment, if one has been already brought, or directing one to be brought and prosecuted under its control; and either of these courses is open to serious objection. In point of authority courts of equity have almost invariably refused to interfere in such cases, though several judges have expressed surprise and regret that the jurisdiction had not been exercised; and intimations have been thrown out that it would be exercised whenever a sufficiently strong case should be presented. In one case, also, a temporary injunction was granted; but the facts sworn to were very strong, and the defendant, though served with notice, did not appear to oppose the motion.[1]

As nuisances consist, for the most part, in so using one's own land as to injure the land or some incorporeal right of one's neighbor, it follows that the injuries caused by nuisances are generally more or less permanent; and, hence, they not unfrequently call for the interference of equity to prevent them. Yet such interference has been found to be attended with great difficulties. An act which is wrongful in itself may be adjudged wrongful before it is committed as well as afterwards; nor is there any question as to the extent of the wrongfulness, for the entire act is wrongful. But an act which is in itself rightful, and which is wrongful only because of some effect which it produces, or some consequence which follows from it, can seldom be proved to be wrongful by *a priori* reasoning, or otherwise than by actual experience; and even when it does sufficiently appear that a given act done in a given way will be wrongful, it does not follow that some part of it may not be rightfully done, or even that the entire act may not be done in such a way as to be rightful. For these and similar reasons a court of equity frequently finds it impossible to interfere in case of a nuisance until the act which constitutes the nuisance is either fully completed, or at least far advanced towards completion; and, in either of the latter events, it will often be found that the damage to the defendant which the interference of the court

[1] Neale *v.* Cripps, 4 K. & John. 472.

will cause will be out of all proportion to the damage to the plaintiff which it will prevent.

A distinction must be taken, however, between things erected or constructed on one's own land which are in themselves a nuisance to one's neighbor, and those which are so only because of the uses to which they are put; for, in cases belonging to the latter class, there may be no occasion for equity to interfere until injury is actually caused, nor is it ever too late to prevent a nuisance for the future without causing anything to be undone.

So, too, when a nuisance is caused by the carrying on of an offensive trade, equity finds no especial difficulty in interfering, unless expensive works have been constructed for the express purpose of carrying on that trade, and which the abandonment or removal of the trade will render wholly or nearly worthless.

The most difficult of all nuisances for a court of equity to deal with are those caused by the erection of massive and costly buildings in large cities. In such cases, if there is danger of a wrong being done, and yet the court does not see its way to granting an injunction, a convenient course is for the court to require the building to be constructed under its own supervision, by directing the defendant to lay his plans before the court, and obtain its approval of them before proceeding.[1]

The interference of equity to prevent the infringement of patents and copyrights is attended with none of the peculiar difficulties which so often occur in cases of ordinary nuisance; and, though a single infringement does not of itself produce any permanent injury, yet the example of successful infringement is contagious and pernicious; and, as it is extremely difficult to prove the extent of the infringement, and so the remedy at law is very inadequate, equity interferes by way of prevention as a matter of course.

Such are the cases in which equity will interfere for the prevention of a tort on account of the nature of the tort, or of the injury caused by it; but there are other cases in which it interferes for a wholly different reason, namely, to prevent the necessity of bringing a great or indefinite number of actions. Thus, if A commit a tort against B, which is capable of indefinite repetition, and B bring an action and recover damages, and A persist notwithstanding in committing the tort, a court of equity will entertain a

[1] Stokes *v.* City Offices Co., 2 H. & M. 650.

bill for an injunction; for otherwise B might have to bring an indefinite number of actions. If, indeed, there be a question of right involved between A and B, equity will not necessarily interfere after a single trial at law, but it will interfere as soon as it thinks the right has been sufficiently tried. So if many persons are severally committing, or threatening to commit, similar torts against one, and each tort involves the same questions, both of fact and law, as every other, the one may file a bill against the many (or against a few of them on behalf of themselves and all the others), and obtain an injunction; for otherwise he would have to bring a separate action at law against each. So, too, if one person is committing, or threatening to commit, torts against each of many others, each tort involving the same questions of fact and law as every other, the many (or a few of them representing themselves and all the others) may file a bill against the one, and obtain an injunction; for otherwise each of them would have to bring an action against him. In such cases the bill is commonly called a bill of peace.

When a court of equity is applied to for a remedy by way of prevention, the defendant may have already begun the commission of the acts of which a prevention is sought, or the plaintiff's case may be merely that the defendant will commit them unless prevented by an injunction. In the latter event the plaintiff may encounter a difficulty in the way of proof; for a court of equity cannot interfere to prevent the commission of an act, however wrongful, merely because the defendant is liable to commit it, nor even because other people think he will commit it; it must be satisfied that he intends to commit it. And yet an intention to commit a wrongful act is apt to be one of the most difficult things to prove, as a person who has such an intention is not likely to proclaim it beforehand by words or deeds; and yet these are the only means by which the intention can be proved.

If the remedy by way of prevention is not made effective until the commission of the acts sought to be prevented has been begun, the plaintiff, of course, needs a double remedy; namely, prevention as to the future, and specific reparation or a compensation in money for the past. If it is a case in which equity can and will compel specific reparation, of course the plaintiff will obtain complete relief in equity, both as to the past and as to the future. But how will it be if (as commonly happens) the plaintiff can have

only a compensation in money for the past? On the one hand, equity will not entertain a bill for the mere purpose of giving a compensation in money for a past tort; and this for two reasons, — namely, first, the remedy at law is perfectly effective; secondly, equity cannot assess damages. On the other hand, if equity does not give relief for the past tort in the case supposed, the burden of two suits will be imposed upon the parties. To avoid this evil, therefore, equity will give relief for the past tort if the plaintiff will accept such relief as equity can give. It is, indeed, possible for equity to give relief for a past tort by way of damages; but it can only do so by sending the case to a court of law for an assessment of damages, and that is quite as objectionable as a separate action. If, however, the tort be one by which the defendant obtains a direct and immediate profit, equity can and will compel him to account with the plaintiff for such profit; and this relief is commonly preferred to an action for damages. Accordingly, in cases of waste, destructive trespass, and infringement of patents and copyrights, it is the constant practice for the plaintiff to pray for an account as well as an injunction. In cases of nuisance, however, an account is seldom asked for, as there are seldom any profits sufficiently direct and immediate to be accounted for.

The next question is, In what cases will equity compel the specific reparation of torts already committed? This question can arise, of course, only in reference to such torts as are in their nature capable of being specifically repaired; and it does not often arise, except in reference to torts committed by the defendant on his own land (*i.e.*, nuisances); for in other cases the plaintiff may generally as well recover damages of the defendant, and then repair the tort himself.

It must be confessed that the ordinary mode of giving relief in equity is not as well adapted to specific reparation as it is to prevention. It is scarcely possible, in the nature of things, for a court successfully to compel the performance of specific affirmative acts, unless they be of a very precise and definite character, such, for example, as paying money, producing documents, delivering possession of property, and executing conveyances of property; and clearly a court ought to be very cautious about attempting what it cannot successfully carry out. It is singular, therefore, that courts of equity have confined themselves so exclusively to their favorite mode of giving relief. In cases where

the title to property is to be affected, no other mode is open to them; but, in cases which involve only the exercise of physical power, courts of equity have all the resources which it is possible for any court to have. When, therefore, justice requires that a tort should be specifically repaired, it would seem to be much more feasible for a court of equity itself to undertake the repair of it, at the expense of the tort-feasor, than to attempt to compel the latter to repair it. For example, specific reparation in the case of a nuisance is an abatement of the nuisance; and there seems to be no good reason why a court of equity should not abate a nuisance, if justice require its abatement. The ancient common law regarded abatement as the proper remedy for a nuisance; and though damages alone can be recovered at law at the present day, that may be only because the actions anciently provided have been superseded by the action on the case.

Courts of equity have shown little disposition, however, to try new modes of giving relief; and hence they seldom attempt to give a remedy for a tort by way of specific reparation. There is believed to be but one instance (and that an ancient one) in cases of waste,[1] no instance in cases of trespass, and but few instances in cases of nuisance,[2] in which an English court of equity has attempted to give such a remedy.

Moreover, notwithstanding what has been said in favor of the abatement of nuisances, it is undoubtedly true that such a jurisdiction should be exercised in modern times with great caution. In many cases of nuisance there is no reason for imputing any intentional wrong to the defendant; and it must not be forgotten that the rights of the latter are as sacred as those of the plaintiff; and, if courts of equity find insuperable difficulties in the way of arresting an expensive work when near completion, much more will they find insuperable difficulties in the way of pulling it down when completed. The mere cost of abating such a nuisance may

[1] Vane *v.* Lord Barnard, 2 Vern. 738; S. C. *nom.* Lord Barnard's case, Ch. Prec., 454 (the case of Raby Castle). According to the report in Vernon the decree directed the master to see the castle repaired at the defendant's expense. Whether the decree was ever performed or not does not appear. It is said not to have been performed during the defendant's life. See Rolt *v.* Lord Somerville, 2 Eq. Cas. Abr. 759.

[2] The first instance was in the case of Robinson *v.* Lord Byron, 1 Bro. C.C. (Belt's ed.) 588, 2 Cox, 4, Dickens, 703. Then followed Lane *v.* Newdigate, 10 Ves. 192, and Blakemore *v.* Glamorganshire Canal Co. 1 M. & K. 154. In very recent times instances of such relief have been much more common.

easily exceed in amount the damage which will be caused to the person injured by its being suffered to remain. Upon the whole, therefore, it cannot be expected that a court of equity will ever make a decree that a costly building, which has been completed, be pulled down; and, if such a decree shall ever be made, there is little likelihood that it will be executed.

There is, however, an obstacle in the way of obtaining a remedy at law for a permanent nuisance, which has not yet been adverted to. Such a nuisance is a continuing tort, *i. e.*, it is a new tort every moment; and the only damages that can be recovered for such a tort are such as have been already suffered; and hence the person injured, if he would obtain full indemnity, must sue periodically so long as the tort continues. Moreover, if he lets too long a time elapse without suing, the tort-feasor may acquire a prescriptive right to continue what was at first a tort. If, therefore, a permanent nuisance has been erected, and it cannot be abated, justice would seem to require that the person injured by it should at least recover at once, and by a single action, a full compensation in money for the injury, and this measure of justice equity may, it seems, grant; for, though equity cannot itself assess damages, yet it may have the full amount of the damages which will be caused by the nuisance assessed by means of a feigned issue, and it may then make a decree that the defendant pay the damages so assessed; and if the defendant, having paid these damages, shall be afterwards sued at law, he may obtain an injunction against the prosecution of the action.

It is well known that every tort as such dies with the person committing it; and therefore no action at law founded strictly upon a tort ever lies against an executor or administrator as such, or against an heir as such. If, however, the deceased tort-feasor has been enriched by his tort, and his ill-gotten gains have gone to his representatives, justice clearly requires that the latter should restore them to the person injured; and accordingly they may be recovered by an action at law, if there be an action, not founded upon the tort, which is adapted to the circumstances of the case. Thus, if a tort-feasor have converted the fruits of his tort into money, an action for money had and received will lie against his executor or administrator. So if the tort consisted in wrongfully taking or detaining property, and the property so wrongfully taken or detained has gone to the executor or administrator, or to the

heir (as the case may be) of the tort-feasor, an action will, of course, lie to recover it back. Frequently, however, there will be no action at law which will be adapted to the circumstances of the case; and in all such cases it seems that equity ought to interfere by compelling a restoration to the person injured of any fruits of the tort which can be found in the possession of the representatives of the tort-feasor. This, however, is not entirely clear upon authority.[1]

It has been assumed hitherto that every tort consists in misfeasance. In fact, however, some torts consist in nonfeasance merely; for whenever the law imposes a duty upon a person, which does not amount technically to an obligation, any failure to perform that duty by which another person is injured (as it is not a breach of obligation) is a tort. It is generally true that a misfeasance is a tort, and a wrongful nonfeasance a breach of obligation; but the converse is also sometimes true; for, as a nonfeasance may be a tort, so a misfeasance may be a breach of obligation. There is, however, a broad distinction, in respect to equity jurisdiction, between misfeasance and nonfeasance; and this fact may suggest the propriety of dividing the jurisdiction over torts and contracts into cases of misfeasance and cases of nonfeasance. It certainly is not convenient to consider those torts which consist in nonfeasance, until those nonfeasances are considered which consist of breaches of contract; but neither is it convenient to consider those breaches of contract which consist in misfeasance until those breaches of contract which consist in nonfeasance are considered. Therefore, both classes of cases will be postponed until the jurisdiction over affirmative contracts is disposed of, *i. e.*, those contracts the breaches of which consist in nonfeasances.

C. C. Langdell.

[*To be continued.*]

[1] See Bishop of Winchester *v.* Knight, 1 P. Wms. 406; Thomas *v.* Oakley, 18 Ves. 184, 186, *per* Lord Eldon; Pulteney *v.* Warren, 6 Ves. 72.